IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 263 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BABUBHAI BHIMJIBHAI KACHADIYA

Versus

STATE OF GUJARAT

Appearance:

MR BM MANGUKIYA for Petitioner

MR MA BUKHARI Ld. APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 04/05/2001

ORAL JUDGEMENT

Rule. Mr MA Bukhari learned APP waives service of rule on behalf of the respondent.

In this application, the petitioner has challenged the legality and validity of the order dated

1.6.2000 passed by the learned Addl. Sessions Judge, Surat while dealing with Criminal Revision Application No. 115/2000. Pending this revision application, the petitioner has also prayed under Sec. 439(2) of Cr.P.C. stating that even otherwise he could have been granted bail. Mr. Mangukia learned counsel appearing for the petitioner, during the course of the argument has fairly submitted that the petitioner is not interested in formal order qua application for bail preferred under sec. 439(2) of Cr.P.C. and this court should decide this revision application preferred by the petitioner and he should be enlarged on bail confirming the order passed by the learned Chief Judicial Magistrate, Surat dated 20.5.2000 wherein the petitioner was granted bail under sec. 167(2) of Cr.P.C.

The petitioner-accused is facing charge of the offence punishable under sec. 302 and 452 of IPC. According to the prosecution, the petitioner has killed his wife by inflicting knife blows on 14.2.2000. The petitioner initially has posed himself as an informant-complainant to the police, but on investigation, he himself was arrested for the offence on 16.2.2000 at about 11.30p.m. by the Investigating Officer. On 17.2.2000, the petitioner was produced before the learned Chief Judicial Magistrate and on request he was granted police remand for one day. On 18.2.2000 at about 15.50 hrs. petitioner was produced before the learned Chief Judicial Magistrate, Surat and was committed to the judicial custody. According to the petitioner, considering the nature of offence, the investigating agency ought to have filed charge-sheet within the period of 90 days i.e. on or before 17.5.2000, but is failed in filing challan under Sec. 173 of Cr.P.C., the petitioner should have been enlarged on bail by the learned Chief Judicial Magistrate, Surat. On 18.5.2000, the petitioner preferred an application for bail as the scheme of Sec. 167 of Cr.P.C.

I have carefully considered the order passed by the learned Chief Judicial Magistrate Surat granting bail to the petitioner holding that the investigating Agency has failed in filing the charge-sheet within prescribed period of 90 days. The order passed by the learned Chief Judicial Magistrate was challenged before the Court of Addl. Sessions Judge, Surat by the State of Gujarat being Criminal Revision Application NO. 115/2000 and after hearing the parties at length, the learned Addl. Sessions Judge, Surat allowed the revision application and quashed the order granting bail to the petitioner

passed by the learned Chief Judicial Magistrate, Surat.

The plain reading of the impugned order passed by the learned Addl. Sessions Judge, Surat, at first glance appears to be a reasoned order, based on relevant judicial pronouncement referred in the order, but considering the facts in reference to the scope of entire scheme of Sec. 167 of Cr.P.C. and especially sec. 167(2) of Cr.P.C. the finding of the learned Addl. Sessions Judge is found erroneous. Mr. Mangukia learned counsel appearing for the petitioner has pointed out that the learned Addl. Sessions Judge has not correctly interpreted the scheme of the Act in special reference to a right embodied in Article 21 of the Constitution of India.

During the course of submissions, Mr. Mangukia has drawn my attention on the recent decision of the Apex Court reported in AIR 2001, SCW, p. 1500 in the case of Uday Mohanlal Acharya vs. State of Maharashtra. Mr. Mangukia learned counsel has taken me through the relevant portion of the judgment of the Apex Court.

Proviso of sub-section (2) of Sec. 167 of Cr.P.C. is unambiguously clear and the same stipulates that the accused shall be released on bail if he is prepared to and does furnish the bail. Bail under sec. 167(2) of Cr.P.C. has been termed as compulsive bail by various judicial pronouncement and such bail would be deemed to be a bail under Chapter-XXXIII. The right to bail where the investigation cannot be completed within the stipulated time, report under sec. 173 of Cr.P.C, if not filed till expiry of the period prescribed 60 days/90 days, than the same would give rise to indefeasible right.

In the case of Uday Mohanlal Acharya (supra), the Apex Court (Per: Majority) has held that the accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Sec. 167 of Cr.P.C. if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. The fact of filing of the challan at any subsequent stage will not take away the right of the accused. In the case before the learned Addl. Sessions Judge, it was not even argued that accused-petitioner was

not prepared to furnish the bail or even he had failed in furnishing bail. In para-7 and 8 of the judgment of Uday Mohanlal Acharya (supra) the Apex Court has considered number of judgments referred therein. After considering various principles propounded in the cases of Bipin Shantilal Panchal vs. State of Gujarat (AIR 1996 SC 2897), Hitendra Vishnu Thakur vs. State of Maharashtra (AIR 1994 SC 2623), Sanjay Dutt vs. State through C.B.I., Bombay (1994 AIR SCW 3857), Aslam Babulal Desai vs. State of Maharashtra (AIR 1993 SC 1) and Abdul Latif Abdul Wahab Sheikh vs. B.K. Jha (AIR 1987 SC 725) alongwith other judgments referred therein, the Apex Court has carved out a ratio that the right to get bail under sub-section (2) of Sec. 167 of Cr.P.C. would not affect adversely on account of submission of police challan subsequently to the application of bail preferred by the detenu. The right whether accrued or not to accused will have to be considered on the date he files application for bail and not with reference to any later point of time. I would like to quote the relevant portion of para-8 of the judgment of Apex Court in the case of Uday Mohanlal Achayra as under:

> In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of S. 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail, that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the Statute Book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the Court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused. Personal liberty is one of the cherished object of the Indian Constitution and deprivation of the same can be only in accordance with law and in conformity

with the provisions thereof, as stipulated under Art. 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Sec. 167, any further detention beyond the period without filing of challan by the Investigating Agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Art. 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in the proviso to sub-section (2) of Sec. 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail, and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the Court then the right of the accused on being released on bail cannot be frustrated on the oft chance of Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file challan within the specified period and the interest of the society, at large, in lawfully preventing an accused for being released on bail on account of inaction on the part of the prosecuting agency."

The Apex Court has further recorded its conclusion in very paragraph which clinches the issue on hand. The Apex Court has said that:

"On the aforesaid premises, we would record our conclusions as follows:

1. Under sub-section (2) of S. 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.

2. Under the proviso to aforesaid sub-section (2) of S. 167, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.

4. When the application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/Court must dispose it of forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section (2) of S. 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression 'if not already availed of used by this Court in Sanjay Dutt's case (1994 AIR SCW 3857 : 1995 Cri. LJ 477) (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-section (2) of S. 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression 'availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of S. 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with S. 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the

provisions of cancellation of bail, already granted in accordance with law laid down by this Court in the case of Mohd. Iqbal vs. State of Maharashtra (1996(1) SCC 722)(supra)"

In view of the above verdict of the Apex Court, it is clear that the finding recorded by the learned Chief Judicial Magistrate was absolutely in accordance with law and, therefore, the revision application preferred by the present petitioner-accused is required to be allowed and he shall have to be released on bail. It is clear that the learned Chief Judicial Magistrate has not committed any error in calculating the date and on 91st day, the application for default bail was preferred in early hours of court working. The learned Chief Judicial Magistrate had issued notice and learned APP regularly appearing in the Court present in the Court, was served with the notice. It is on record that on instruction of ld. PP appearing in the matter, the Investigating Officer had rushed to the court on that day at about 3.30p.m. and filed the charge-sheet. I have underlined some part of the observations/conclusions made by the Apex Court which clearly indicates that subsequent filing of the charge-sheet is irrelevant even if it is filed on same day, therefore, the say of Mr. Bukhari that the State has filed the charge-sheet on the day on which the petition for default bail was preferred would not help the respondent-State.

The Apex Court has considered the entire scheme in the light and spirit of Article 21 of the Constitution of India. Facts of case on hand suggest that the investigation was over and a report under sec. 173 of Cr.P.C. was also must have been prepared. It can be observed that this must be a case wherein the Investigating Agency was ready with the charge-sheet, but for the reasons best known to the Investigating Officer, he retained it with him and was waiting till the date petitioner approaches the Court for default bail. Either the Investigating Officer can be said to be inefficient or negligent or dishonest or a victim of circumstances beyond his control but this Court is not concerned with it. The fact remains that the charge-sheet was filed after filing of the default bail application. This Court has not to say anything new or more in the light of the above verdict of the Apex Court and the plea raised by the petitioner before this Court. Therefore, this revision application is allowed. The order passed by the learned Addl. Sessions Judge in Criminal Revision Application NO. 115/2000 is hereby quashed and set

aside. The order passed by the learned Chief Judicial Magistrate granting default bail to the petitioner is restored, however, considering the gravity of the offence, I would like to impose certain more conditions.

Mr. Mangukia, learned counsel appearing for the petitioner submitted that instead of Bank Guarantee, the petitioner be asked to give surety of some higher amount. So, the petitioner is directed to be released on bail on the following conditions:

This criminal revision application is allowed. The petitioner-accused is ordered to be released on bail on his executing a bond of Rs. 20000/ (Rs. Twenty Thousand only) with one surety of the like amount to the satisfaction of the lower Court on the same terms and conditions as imposed by the learned Chief Judicial Magistrate, Surat with following further more conditions which the petitioner shall have to abide by it;

a) shall not leave the concerned district without prior permission of the concerned Sessions Court;

b) shall get his presence marked at Varachha Police Station on every 1st and 15th day of each month between 900a.m. to 5.00pm.;

c) shall appear before the concerned court regularly either in person or through advocate in case of exigencies;

Rule made absolute. Direct service permitted. Yadi to the concerned police station.

(C. K. BUCH, J.)
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